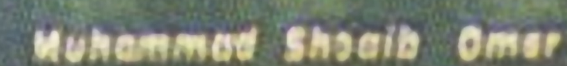
Islamic Law Of Divorce

Basic Concepts

by



Idara-e-Islamiat

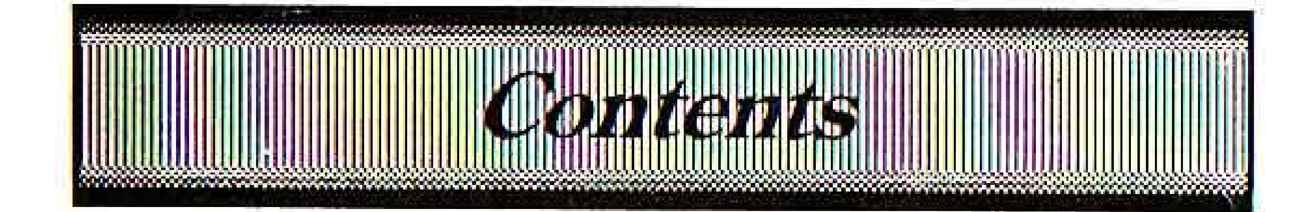
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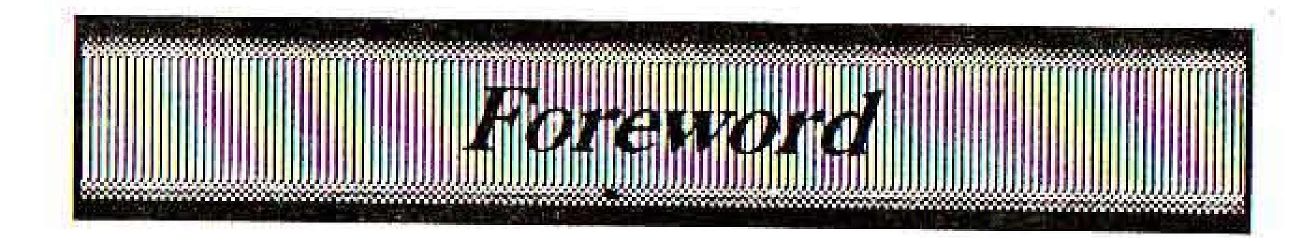
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Foreword

The major and significant portions of the text were read to me by the author. I was pleasantly surprised to find such a well-researched and authentic book.

In the light of the scope and purpose of the work, I am convinced that nothing more could be said or added to the subject. In my view, the author has set out the subject matter clearly and concisely.

The work is a need of the times, and as far as I am aware the first published work on the subject in South Africa. For this reason I congratulate the author on his fine achievement and pray that many more such works flow from his pen from time to time.

The authorities and references quoted are completely authentic – whether Quran, Hadith or Legal Treatises.

Maulana Abdul Rehman Ansari
Jamiatul Ulama Natal, South Africa.

Preface

The objective of this book is to set out the basic rules of the Islamic Law of Divorce in a clear, concise and simple manner. Accordingly, technical terminology has been avoided from the body of the text wherever possible to facilitate understanding and easy reference.

It is hoped that this work dispells some of the doubts that have arisen in regard to the law of divorce, and stimulates further research into this interesting field of Law.

My sincere thanks to all those who gave me valuable advice in the preparation of the text. Of particular mention are my colleagues DAWOOD KADWA and SHABBIR BANOOBHAI.

May the **Almighty** accept this humble endeavour and render it a source of benefit to all.

Mahomed Shoaib Omar

Chapter 1

Introduction

The Islamic law of divorce is probably the most misunderstood branch of Islamic Law. This misunderstanding may be attributed not only to Non-Muslims but also to many Muslims who, due to ignorance of its basic rules and procedure, have abused the right of divorce and exercised it in a manner that is opposed to the Islamic Law itself. such abuse of this right has resulted in legal consequences to the detriment of the parties concerned eg. the pronouncement of three divorces simultaneously in a fit of anger or under provocation.

A. SOURCES OF ISLAMIC LAW

It is appropriate, before dealing with the subject of divorce, to discuss briefly the sources of Islamic Law from which legal rules

are derived. These sources are four in number, namely:

1) Qur'an
2) Sunnah
3) Ijma
4) Qiyas

1) QUR'AN

This is the highest source of authority as it is the word of Allah. It constitutes the primary source of law in that the rules contained therein are binding on Muslims for all times. The Qur'an was not revealed in isolation. Allah sent a teacher, that is, the Prophet Muhammad (Sallal lahu alaihi wa sallam) whose main function was to interpret, explain and implement the text of the Qur'an. In this regard, Allah states in the Qur'an:

وَأَنْزَلْنَا إِلَيْكَ الذِّكْرَ لِتُبَيِّنَ لِلنَّاسِ مَا نُزِّلَ إِلَيْهِمْ.

``And we have revealed the Qur'an to you in order that you may clearly explain to the

people what has been revealed to them." (S 16: V44)

It logically follows that the correct interpretation of the Qur'an is that of the Prophet (Sallal lahu alaihi wa sallam) and his companions who were most closely associated with him and who understood the context in which the Qur'an was revealed and witnessed the practical implementation of its teachings.

2) SUNNAH

This term refers to the sayings and actions of the Prophet (Sallal lahu alaihi wa sallam) which have been recorded in the form of Hadith.

The Sunnah is the second source of Law being an exposition and elaboration of Qur'anic principles as stated above[1]. Accordingly, it is clear that the Qur'an cannot be understood without reference to the example and interpretation of the Prophet (Sallal lahu alaihi wa sallam). This, in turn, means that the application, interpretation and

transmission of Islamic Law and teachings is dependent on the preservation of both the Qur'an and the Hadith. Allah himself has taken the responsibility of preserving these two fundamental sources of Islamic Law which shall remain in existence until the day of resurrection. the Qur'an states in this regard:

إِنَّا نَحْنُ نَزَّلْنَا الذِكرَ وَإِنَّا لَه لَحَافِظُونَ.

"Verily we have revealed the Qur'an and we are its Protectors." (S 15: V9)

In this verse the word "Zhikr" refers to both the words and the meanings (ie. The sunnah) of the Qur'an. This is so because the word "qur'an" signifies both words and meanings.

In short, if an impartial study relating to the science of the authenticity, proof and transmission of the Hadith is made, one is left with no doubt that such an ingenious system could only have been divinely planned and ordered as the above verse testifies.

3) IJMA

This term refers to the unanimity of opinion of the companions and successors on a particular point of Law or legal rule. It is not permissable to hold a contrary view when a matter has been decided by IJMA. Thr proof of Ijma as a source of law may be adduced from both the Qur'an and Hadith.

وَيَتَّبِعْ غَيْرَ سَبِيلِ الْمُؤْمِنِينَ نُوَلِّهِ مَا تَوَلَّى وَنُصْلِهِ جَهَنَّمَ وَسَآءَتْ مَصِيراً.

``Whoever follows a path other than the path of the Muslims, we shall assign to him what he has chosen and shall cause him to enter the fire, an evil Journey's end." (S 4: V 115)

The reference to *``the path of the Muslims"* in this verse is a reference to Ijma.

4) QIYAS

This term refers to inference based on analogy. This source of law is applied in the

absence of an express text of the Qur'an or Hadith and enables Islamic Law to be applied to changing situations and needs. Qiyas is subject to a defined set of conditions which are beyond the scope of this booklet.[2]

B. MARRIAGE AND DIVORCE IN LIGHT OF QUR'AN AND ṢUNNAH

In order to understand the Islamic Law of Divorce, it is necessary to know the nature of the marriage contract in Islam.

Marriage in Islam is not simple contract like other commercial contracts such as sale, hire, suretyship, partnership, donation etc. In essence, the marriage tie in Islam consists of two elements: an element of contract and that of Ibàdàt[3] ("Worship"). Marriage viewed from one perspective is a contractual relationship in that it is based on the consent of the parties. From another perspective, it is an act of Ibàdàt.

This difference in the nature of marriage as oppsoed to ordinary commercial contracts is due to the following reasons:

Firstly, the presence of two witnesses is an essential requirement for the validity of the marriage. In the case of ordinary contracts the absence of witnesses does not affect their formation.

Secondly, the Khutba (``Preliminary address") and the E'hlaan (``Announcement") confer on the contract the element of Ibàdàt.

Thirdly, marriage has been greatly emphasised as opposed to other contracts. Take the following two Ahadith:

النكاح من سنتي

``Marriage is of my sunnah."

من استطاع منكم الباءة فليتزوج.

``Whoever has the ability to marry, he must marry."

Accordingly, having regard to the differences between the marriage contract and ordinary contracts in relation to their formation, the manner of dissolution of these contracts differs. The dissolution of the marriage is subject to certain conditions which are set out in the next chapter.

Chapter 2

Conditions Relating to Dissolution

1. DIVORCE ---------- INSTRUMENT OF LAST RESORT

The fact that marriage includes an element of Ibàdàt means that the marriage relationship must be a permanent one and not be terminated willy nilly at the instance of the husband.

Accordingly, in the event of disputes between the parties, the Qur'an has specified certain preliminary steps such as admonishment in a kind manner,[4] which are direccted towards the settlement of these disputes and the maintenance of the marriage relationship. This is so because stable family relations are considered as a cornerstone of a healthy society. Marriage breakdowns not only cause considerable hardship to the

parties concerned and any children born of the marriage but are also detrimental to society at large.

If these preliminary steps fail, the Qur'an provides that an effort be made to resolve the dispute by means of arbitration. In this respect the Qur'an states:

وإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُواْ حَكَمـاً مِّنْ أَهْلِهِ وَحَكَمـاً مِّنْ أَهْلِهَا إِنْ يُرِيْدَا إِصلاَحاً يُوَفِّقِ اللّهُ بَيْنَهُمَا إِنَّ اللّهَ كَانَ عَلِيْماً خَبِيْراً.

``If you fear a breach between them (husband and wife) appoint a judge from his family and a judge from her family, if they both (Arbitrators) wish for peace Allah will cause their reconciliation. Allah is all knowing, the most great." (S 4 : V 35)

The wisdom of appointing arbitrators belonging to the families of the parties is that the dispute is confined to the family and is not given adverse publicity. At the same time the arbitrators would most properly understand

the dispute being familiar with the parties lifestyles and habits and would be most inclined to upholding the marriage. Again, as the verse states, if the arbitrators sincerely desire reconciliation they would receive the unseen help of Allah and such reconciliation would in fact be achieved.

Where all efforts towards reconciliation fail and there is no prospect whatsoever of reconciliation, then in such event the husband may exercise his right of divorce as an instrument of last resort and by way of necessity. In such a case the right may be exercised because it would be unjust to both parties to maintain a marriage which has irretrievably broken down. The right of divorce as an instrument of last resort is clear from the following Hadith:

ابغض الحلال إلى الله عزوجل الطلاق.

``The worst of permissable things in the sight of Allah is Talaaq."

2. RIGHT OF DIVORCE MUST BE EXERCISED IN THE PRESCRIBED TIME: PERIOD OF PURITY

The contract of marriage should not be cancelled at any time at the arbitrary will of the husband. Ordinary contracts, on the other hand, may be cancelled at any time bilaterally or unilaterally by words, conduct or writing thereby entitling the contracting parties to enter into new contracts with third persons. This difference in the manner of termination between ordinary contracts and marriage is due to the fact that the latter contract must only be dissolved in the case of the utmost necessity.

The Qur'an has specified a fixed period within which the right of divorce must be exercised:

إذَا طَلَّقْتُمُ النِّسَآءَ فَطَلِّقُوْهُنَّ لِعِدَّتِهِنَّ

"When you divorce women, divorce them at their prescribed periods." (S 65: V 1)

The *``prescribed periods"* referred to in this verse mean a period of purity in which sexual relations have not taken place. This also appears from a statement of a well-known companion and jurist Ibn Masud[5] :

عن ابن مسعود رضي الله عنه في قوله تعالى: "فطلقوهن لعدتهن"، قال: "في الطهر من غير جماع". (فتح البارى، ٩:١٠٣)

``On the authority of Ibn Masud who said: The statement of Allah `Divorce them at their prescribed period' means (Divorce them) in a period of purity in which sexual intercourse has not taken place."

In short, therefore, the right of divorce must be exercised in a period of purity in which sexual relations[6] have not taken palce.

The benefit of prescribing a fixed time is that by awaiting the arrival thereof, the possibility of reconciliation remains in that tempers may be cool and normal family life restored in the intervening period. It is,

therefore, clear that the right of divorce is not a mere tool to be manipulated at the will of the husband and subject to his whim and fancy.

3. CORRECT MANNER OF GIVING DIVORCE.

The corrcet manner of giving divorce[7] accroding to the Sharia is as follows:

(a) An express divorce (ie., in the following form: ``I divorce You" or ``You are Divorced") must be given by the husband to the wife in a period of purity in which sexual intercourse has not taken place. After such pronouncement, the wife must be allowed to complete three menstrual periods (in the case of menstruating women) known as Iddat [8]. The prescribed period of waiting or Iddat differs in the case of different women as appears below.

(b) Upon the pronouncement referred to in paragraph (a) above, the husband is entitled to re-take the wife in the sense of resuming normal conjugal relations before the expiry of the prescribed period of waiting or Iddat. The

re-taking or "Return" is effected without performing a marriage ceremony, (Nikah) and becomes attached to the original Nikah which is revived.

(c) Upon the expiry of the prescribed period of waiting or Iddat, the wife is free to marry a third party of her choice or re-marry her previous husband.

كانوا (أي الصحابة) نستحبون أن يطلقها واحدة ثم يتركها حتى تحيض ثلاث حيض". رواه ابن أبي شيبة بإسناد صحيح (دراية ٦٢٢).

"The companions of the Prophet (Sallal lahu alaihi wa sallam) used to like that (women) be divorced once and thereafter left to complete three menstrual cycles[9]." (Diràya 622)

(d) It is preferable that the pronouncement referred to in paragraph (a) be evidenced by two witnesses so as to avoid any dispute.

4. IRREVOCABLE CANCELLATION OF MARRIAGE BOND: THREE STAGES

The situation may arise where a person may wish to dissolve his marriage finally and irrevocably. For this purpose the sharia has given him the right to pronounce an express divorce in three distinct stages as follows:

The husband pronounces an express divorce in a period of purity in which sexual relations have not occurred. Thereafter, he pronounces one express divorce in two subsequent distinct periods of purity. In short, an express divorce is pronounced in three seprated periods of purity as appears from the follwoing statement of the Prophet (Sallal lahu alaihi wa sallam) reported on the authority of Ibn Umar (Radiyallahu Anhu):

طلاق السنة تطليقة وهي طاهر في غير جماع،

فإذا حاضت وطهرت طلقها أخرى

فإذا حاضت وطهرت طلقها أخرى

"Sunnah (as opposed to Bidah–see below) is to divorce the wife expressly in a period of purity in which sexual intercourse has not taken place. Thereafter to divorce her for a

second time expressly when she has menstruated and become pure. Thereafter, to divorce her for a third time expressly after she has menstruated and become pure."

The purpose of the Sharia is that one divorce be given in a state of purity so that the doors of reconciliation remian open and that the marital relationship may be resumed at a subsequent period.

Accordingly, a person, who, out of crass stupidity,[10] may desire to give three divorces, is entitled to do so provided he gives these divorces in three separate stages as provided herein.

The three divorces in three seperate periods of purity is referred to as ``Sunnah". [11] This term has been used not to indicate preferability on the part of the Prophet (Sallal lahu alaihi wa sallam) but in contradistinction to Bidah which is the issuing of three divorces simultaneously (see below) and which is prohibited.

The matter is succinctly summarised by a well known commentator of the Qur'an as follows: [12]

"The intention of the Prophet (Sallal lahu alaihi wa sallam) in using the term 'Sunnah' is not that reward will be received because the act of giving three divorces in three separate stages of purity is permissable– This act is not liked or recommended. On the contrary the meaning is that this procedure has been adopted in religion – that is there will be no punishment for the adoption of this procedure." (Rooh ul Mehani)

روح المعانى

TWO CONSEQUENCES OF DIVORCE

Upon the pronouncement of divorce, the following two consequences take effect:

1) The wife is released from the marriage (Nikah) of the person giving divorce. In the absence of re-taking as previously mentioned, she is not regarded as his wife, although she is required to observe the prescribed waiting

period. This is why the Qur'an has referred to such woman as "divorced" even before the expiry of the waiting period in the following verse:

وَالْمُطَلَّقَاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلاثَةَ قُرُوْءٍ.

"And divorced women shall wait for three menstrual periods." (S 2: V 228)

Women who have not enjoyed a period of privacy with their husbands may at their discretion marry any thrid party upon the pronouncement of divorce because they are not required to observe the prescribed waiting period or Iddat. This is clear from the following Qur'anic verse:

يَاأَيُّهَا الَّذِيْنَ آمَنُوا إِذَا نَكَحْتُمُ الْمُؤمِنَاتِ ثُمَّ طَلَّقْتُمُوْهُنَّ مِنْ قَبْلِ أَنْ تَمَسُّوهُنَّ فَمَا لَكُمْ عَلَيْهِنَّ مِنْ عِدَّةٍ تَعْتَدُّوْنَهَا فَمَتِّعُوهُنَّ وَسَرِّحُوْهُنَّ سَرَاحاً جَمِيْلاً.

"O Believers ! If you marry believing women and then divorce them before you have touched them, you are not required to

calculate a waiting period for them. Hence make provision for them at once and release them in a becoming manner." (S 33 :·V 49)

2) The second consequence relates to the fact that upon the expiry of the mandatory waiting period, or Iddat. The wife is entitled to conclude another marriage with a third party. Its effect is therefore suspended until the expiry of the Iddat.

Chapter 3

Effect of Three Divorces: Irrevocable Dissolution

Where a person gives three divorces simultaneously, or in one period of purity (see below) or in three separate stages or over a period of time, the marriage bond is irrevocably dissolved. For the purpose of computation of the number three, all previous pronouncements of divorce are taken into account.[13]

In such a case where three divorces are given, the husband has exercised all his rights in this regard. Once the Iddat has expired, the wife is at liberty to marry a third person. The husband loses his right of re-taking as hereinbefore mentioned before the expiry of the Iddat. The marriage bond is irrevocably served and the parties cannot marry again except in one situation, namely, where the wife

marries a third person who consummates the marriage and subsequently divorces her in the ordinary course of events.[14] In such event the wife may marry her previous husband.[15] This is clear according to the express text of the Qur'an which is as follows:

فَإِنْ طَلَّقَهَا فَلاَ تَحِلُّ لَه مِنْ بَعْدُ حَتَّى تَنْكِحَ زَوْجاً غَيْرَه.

``Then if he has divorced her (for the third time), she is not lawful unto him after such third divorce until she has married another husband." (S 2: V 230)

فَإِنْ طَلَّقَهَا فَلاَ جُنَاحَ عَلَيْهِمَا أَنْ يَتَرَاجَعَا.

``Then if the second husband divorces her there shall be no sin on either of the two if they return to each other." (S2: V230)

IDDAT OR PRESCRIBED PERIOD OF WAITING

In the case of Iddat, three situations must be distinguished:

1) In the case of women who experience menstrution, the mandatory period of waiting is three menstrual periods[16].

وَالْمُطَلَّقَاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلاَثَةَ قُرُوْءٍ.

``And divorced women shall wait for three menstrual periods." (S 2: V 228)

2) Women who have not reached the age of puberty, or who have passed the age of monthly courses, shall wait for a period of three months.

وَالّٰى يَئِسْنَ مِنَ الْمَحِيْضِ مِنْ نِسَآئِكُمْ إِنِ ارْتَبْتُمْ فَعِدَّتُهُنَّ

ثَلاَثَةُ أَشْهُرٍ وَالّٰى لَمْ يَحِضْنَ.

``And those of your women who have passed the age of monthly courses, their prescribed period if

you have doubt is three months, and for those (minors) who have no courses (it is the same)." (S 65: V 4)

3) In this case of pregnant women, there period shall be until the delivery of their children.

ۚ وَأُولَاتُ الْأَحْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ.

``The period of pregnant women is until they deliver their burdens." (S 65: V 4)

Chapter 4

Three Divorces Simultaneously Legally Effective but Prohibited

It is clear from the preceding discussion that the right of divorce may be exercised in the case of necessity. The correct manner of such exercise is that one clear express divorce must be given in a state of purity wherein sexual relations have not occured.

. This leaves open the possibility of reconciliation by the procedure of retaking, or after the expiry of the Iddat gives the wife the right to conclude a new marriage. Although it is permissable to issue divorce in three separate stages, the act being per se abhorrent may be exercised in its lowest degree, ie., once. The Qur'an envisages a maximum

exercise of two divorces in two separate stages or periods of purity in the following verse:

اَلطَّلَاقُ مَرَّتَانِ

"Divorce is (Express) twice." (S2: V 229)

Where, however, a person fails to avail himself of the procedure prescribed by Islam with its attendant advantages and benefits, and gives three divorces simultaneously (such as: "I divorce you", "I divorce you", "I divorce you"), the following two questions arise in relation to such pronouncement:

(a) Whether such pronouncement is legal or illegal;

(b) Whether legal effect will be given to such pronouncement irrespective of its legality or illegality.

In regard to (a), the matter is simple : such pronouncement is illegal and prohibited. The utterer is a sinner who has incurred the wrath of Allah and his Prophet (Sallal lahu alaihi wa sallam). In numerous Ahadith the

Prophet (Sallal lahu alaihi wa sallam) indicated his intense anger of the persons who made such pronouncements. They have been likened to playing with the Qur'an. The jurists have termed such pronouncemnets as ``Bidah" (Innovation).

In relation to (b), the Prophet (Sallal lahu alaihi wa sallam) notwithstanding his abhorrence has given such pronouncements full legal effect and has accorded them the status of three divorces. In the result, the marriage bond is irrevocably dissolved, the right of re-taking is lost and the parties cannot re-marry except in the situation previously described.

At this stage an objection may be raised as follows: ``How is it possible for an unlawful act to bear consequences?" The answer is that the illegality of an action is not a bar to the consequences of such action from coming into operation. Take the following examples: Intentional murder is a serious crime but the unlawful act of say shooting does not prevent

the consequence (namely, death) from being operative. The act of theft is unlawful, but the consequence (namely, removal of property) nevertheless ensures.

In the case of pronouncements of three divorces made at one time, two situations must be distinguised:

i) Where a person says to his wife ``I divorce you", ``I divorce you", ``I divorce you" at one time with the express intention of giving three divorces. In such a case, the Prophet (Sallal lahu alaihi wa sallam) held that three divorces took effect althought the utterer is a sinner. As an illustration, take the following two Hadith:

عن علي رضي الله عنه قال سمع النبي ﷺ رجلاً طلق البتة فغضب وقال تتخذون آيات الله هزوا اولعبا ؟ من طلق البتة الزمناه ثلاثاً لاتحلّ له حتى تنكح زوجاً غيره

(المغنى لا بن قدامه ص١٠٣ ج٧)

``On the authority of Ali (Radiyallahu Anhu) who said: the Prophet (Sallal lahu alaihi wa sallam) heard of a person giving three divorces.

He became angry and said `You take the verses of Allah as mockery and play?' Whoever gives three divorces at one time will be deemed to have given three and his wife will not be permissable to him until she marries another husband."

وفي حديث ابن عمر رضي الله عنه قال قلت يا رسول الله أرأيت طلقتها ثلاثاً قال اذا عصيت ربك وبانت منك امرأتك (مغنى ص١٠٣ ج٧)

``In the Hadith of Ibn Umar who said: ``What is your view if I give may wife three divorces" The Prophet (Sallal lahu alaihi wa sallam) replied: ``You have sinned and your wife shall become separated from you (ie. divorced)."

ii) Where the words ``Talaaq", ``Tallaq", ``Talaaq" are repeated merely by way of emphasis and not for the purpose of giving three talaaq then the position is as follows:

a) During the time of the Prophet (Sallal lahu alaihi wa sallam), Hazrat Abu Bakr (Radiy-allahu Anhu) and the early period of the

caliphate of Hazrat Umar (Radiyallahu Anhu), these words of divorce uttered by way of emphasis were construed as one divorce in accordance with the intention of the person granting divorce because general reliance could be placed on the honesty, integrity and trustworthiness of the persons of that period.

b) Hazrat Umar (Radiyallahu Anhu) however, during the latter part of his reign after due consultation with the companions held that three divorces whether intentionally uttered or merely by way of repetition would be deemed as three because of the deterioration in the standards of honesty, integrity, trustworthiness and religious spirit. The companions did not object to judgment and it was held to be in accordance with the Qur'an and Sunnah.

In short, therefore, three divorces uttered simultaneously whether intentionally or by way of repetition will constitute three according to the consensus of the overwhelming majority of the jurists including the

founders of the Hanafi, Shafei, Maliki and Hanbali schools. This consensus is recorded by the well-know scholar Imam Nawawi (Rehmat Allah alaihi) in the following words:

قال الشافعي ومالك وأبو حنيفة واحمد وجماهير العلماء من السلف والخلف يقع الثلاث وقال طاوس وبعض اهل الظاهر لا يقع بذلك الاوحده. (شرح مسلم)

``Imams Shafei, Malik, Abu Hanifah, Ahmed Bin Hanbal and the general body of Ulema preceding and succeeding have held that three divorces take effect. Hazrat Taus and some literalists (Ahl-uz-Zahir) held that one divorce took effect."

It must be mentioned that the pronouncement of Divorce in a state of menstruation is also Bidah and prohibited. The divorce nevertheless, takes effect. It is obligatory in such a case to take her back and divorce her in a state of purity, or [18] retain her.

Chapter 5

Divorce by Implication[19] No Right of Re-taking

This refers to an expression or words which, buy virtue of coinage, may be used in tow senses:

a) the words or expression may have been employed to mean pronouncement of divorce;

b) the words or expression may have been used to convey another meaning, ie., a meaning other than that of divorce.

Such category of words or expressions are know in Islamic Law as KINAYAH. For example, a husband says to his wife:

"YOU ARE SEPARATED." This expression may mean:

a) separation from the marriage – tie; or

b) separation from all that is good or evil.

Accordingly, because the expression or words bear the potential of at least two meanings, reference must be made to the intention of the husband to fix a particular meaning. If the husband intended by the use of such words or expression to pronounce a divorce, such divorce will take palce.

The divorce uttered by the use of such expressions will be of the category of

BAIN. This means that the husband does not have the right to re-take the wife prior to the expiry of the Iddat (as opposed to express divorces). Once the Iddat has expired, the wife is free to marry any person of her choice. The above rule is subject to an exception:

In the case of a discussion relating to divorce the surrounding circumstances will legally impute an intention to divorce the

husband. In such a case, there is no need for a reference to the intention of the husband. For example: a wife says to her husband:

"I REQUEST THAT YOU DIVORCE ME", the husband, in reply, says: "YOU ARE SEPARATED", provided, however, that the words used in such discussions convey the meaning of a separation.

EXPRESS DIVORCE [21] AND THE RIGHT OF RE-TAKING

This refers to words which can only be used to denote a divorce, such as, "I Divroce You," in such a case, the husband has the right to re-take[22] the wife before expiry of the Iddat in the sense of resuming normal conjugal relations. The right of re-taking is effected without the need to perform a new Nikah, and must result from gneuine motives of reconciliation. This is clear from the following verse of the Qur'an:

فَامْسَاكٌ بِمَعْرُوْفٍ أَوْ تَسْرِيْحٌ بِاحْسَانٍ.

"Retain her in fairness and without hurt to her or release her kindly." (S2: V229)

The words "Imsaak Bil Maraf" indicate two matters. First, the retention or re-taking does not require a new Nikah but is based on the previous Nikah. Second, that the right of re-taking must be allowed to undergo Iddat which implies that upon expiry thereof, she is freed in the sense that she is entitled to conclude a new marriage of her choice. Again, the verse points to the fact that the right of re-taking should not be used as an instrument of oppressing the wife.

The Qur'an provids that the right of re-taking be preferably evidenced by two witnesses. This has two benefits: Fist neither party may deny that a re-taking has been effected: and second, that the husband may not falsely claim after the expiry of the Iddat that he has exercised his right of re-taking merely to cause hardship to the wife. The provision relating to witnesses is as follows:

وَأَشْهِدُوا ذَوَىْ عَدْلٍ مِنْكُمْ وَأَقِيْمُوا الشَّهَادَةَ لِلّهِ.

"And take for witness two just persons from among you (Muslims) and establish the witness for Allah." (S 65: V2)

The right of re-taking is available twice, (ie., where two express divorces have been given) so that it may not be used by an unjust husband to perpetually oppress the wife.

Chapter 6

Oppressive Husband: Wife's Remedy

It is clear from the preceding discussion that Islam has given the right of divorce to the husband, who must exercise this right only in the case of necessity and subject to certain conditions.

The wife has not been accorded the right in order to prevent divorce from being a tool of impulse since women are more prone to act impulsively and on the spur of the moment.

However, this does not mean that a woman must undergo all kinds of affictions and torments without recourse to legal rights. The wife is entitled to petition an Islamic Court (or in its absence, a duly constituted committee of Ulema) and demand that the

marriage be dissolved by proving her complaints[23] as the function of such court or committee is to remove the suffering experienced by the wife.

At the same time the Qur'an warns those husbands who, after giving an express divorce, re-take their wives merely to oppress them and without any desire to fulfill their rights. In the absence of reconciliation a wife should be released kindly. The words of the Qur'an are as follows:

وَلاَ تُمْسِكُوهُنَّ ضِرَاراً لِتَعْتَدُوا وَمَنْ يَفْعَلْ ذالِكَ فَقَدْ ظَلَمَ نَفْسَهُ وَلاَ تَتَّخِذُوا آيَاتِ اللهِ هُزُواً.

``Do not take them back to hurt them so that you may transgress (in this way) and whoever does that then he has wronged his soul. And do not treat the verses of Allah as a mockery," (S 2: V231)

In the South African context, this verse of the Qur'an is an appropriate reminder to those husbands who obtain a divorce order

from a South African court but, at the same time, stubbornly refuse to grant their wives an Islamic divorce on grounds of spite, malice and a desire to cause hardship to them.

TRANSFER OF RIGHT OF DIVORCE TO WIFE IN ANTE-NUPTIAL CONTRACT

The husband may validly transfer his right of divorce to his wife who may exercise it under conditions specified in a written ante-nuptial contract[24] Once granted, such transfer cannot be unilaterally revoked or cancelled by the husband. An example of a clause in this regard in such an ante-nuptial contract is as follows:

"The husband hereby transfers his right of divorce to his wife who may exercise it in the following circumstances:

a) Where the husband is guilty of misconduct whether in the form of beatings, assaults, or persistent abuse which conducts renders living with him intolerable.

b) Where the husband maliciously deserts his wife and refuses to return to her.

c) Where the husband sues for a decree of divorce in a South African Court in terms of South African Law and / or obtains a decree of divorce from such court.

d) Where the marriage between the parties has irretrievably broken down and there is no prospect of reconciliation.

e) Where the husband refuses to maintain his wife or afford her the marital privileges.

The exercise of the right of divorce by the wife hereinbefore stated would constitute an exercise in the category of BAIN, ie., the husband is unable to re-take his wife before the expiry of the prescribed monthly periods in the absence of a valid NIKAH, and upon expiry of such prescribed period the said wife is free to conclude a marriage of her choice."

Chapter 7

Miscellaneous Rules [25]

1. The following persons possess capcity to grant a divorce:

i) a person who has attained the age of maturity and is in full possession of his mental faculties.

The divorce of a minor boy, or insane husband is of no effect.

2. Divorce given by the following persons is valid and of full force and effect:

i) a divorce uttered under duress or threat of force[26].

ii) a divorce uttered in a state of intoxication[27].

iii) a divorce uttered in jest[28].

iv) a divorce given by a dumb person by means of his signs.

3. A divorce which is subject to a future condition shall become operative upon the fulfillment of such condition. For instance, a person says to his wife: "If you enter the home you are divorced." The divorce takes effect upon the wife's entry into the home.

4. The husband is entitled to assign the right of divorce to his wife which must be exercised by her in the meeting in which such right is assigned unless the terms of the assignment indicate that the right may be exercised at any time. For instance, a husband may validly say to his wife: "I hereby assign my right of divorce to you and you are free to exercise such right whenever you wish."

5. Where a husband gives separate divorces to his unconsummated wife (such as, "I divorce you", "I divorce you", "I divroce you"), the first divorce takes effect because an unconsummated wife is not required to

observe Iddat. The second and third divorces are invalid.

6. A person who dirvoce his wife in mortal illness (Marad-ul-maut) who subsequently dies before the expiry of the Iddat deos not succeed in disinheriting his wife who shall be entitled to inherit from him.

7. In the case of an express divorce (such as, "You are divorced"), no recourse is had to the intention of the person pronouncing divorce so that one divorce takes effect notwithstanding that more than one may be intended.

8. If the husband, after the expiry of the Iddat, claims that he has exercised the right of re-taking and the wife denies such claim, then in such event the statement of the wife will be believed in the absence of proof.

9. Where a woman marries a third person after being divorced by her former husband once, twice or thrice, and such marriage, which occurs after the expiry of the Iddat, is

consummated by such third person, then: if the woman remarries her first husband then such husband acquires the right to grant three divorces, all previous divorces being nullified.

10. A husband is entitled to divorce his wife in writing. for instance, a husband states in a letter to his wife: ``I hereby record that I have divorced you".

According to these words, a valid express revocable divorce takes effect. The husband is entitled to take his wife back before the expiry of the Iddat. Upon expiry, she is free to marry a person of her choice.

Footnotes

1. At the same time, it must be noted that the Hadith is also an independent source of law apart from the Qur'an in the sense of establishing legal rules which are contained in the Qur'an. This law-creating role of the Hadith independent of the Qur'an is clear from the following staement of the Prophet (Sallal lahu alaihi wa sallam) .:

   ``*And indeed the Prophet of Allah has prohibited certain things just as Allah has done.*"

   In any event the specific function of the Hadith would be an exposition of the Qur'an in that its scope would fall under the follwoing general Qur'anic command:

"Whatever the Prophet (Sallal lahu alaihi wa sallam) gives you, take it and whatever he forbids, refrain (from it)." (S 59: V 7)

See "The Qur'an and Hadith", Maulana Qari Muhammad Tayyib, Fadl-ul-Bari, Vol 1, Eng, P113-114.

2. IJMA and QIYAS are not primary sources but are subordinate to the Qur'an and Sunnah in the sense that they are based on these two primary sources and cannot exist apart from them. See "Qur'an and Hadith" op cit p105. Qiyas based on personal opinion is invalid.

3. According to the great jurist Imam Hafifah (Rahmat Allah) the element of Ibadat is the predominating one, on the distinction between the marriage contract and ordinary contracts, see generally:

a) Tafsir Maariful Qur'an: Mufti Muhammad Shafei (Rahmat Allah) Vol 1 (S 2: V 229).

b) "Our Family Problems" (in Urdu), Maulana Muhammad Taqi Usmani: p156-157.

4. And also the separation of beds within the matrimonial home and minor light Beating without causing pain or injury. (S 4: V 54)

   Striking the face is prohibited. Beating is not the practice of noble men, nor was it resorted to by the Prophets. In fact, the Hadith says:

   ``Noble husbands shall never beat their wives"

   The verse postulates fault on the part of the wife by reference to the immediately preceding words:

   ``And as for those women who e disobedience you fear."

   See Tafsir Maariful Qur'an, Vol 2, op cit, at S 4: V34.

5. Quoted in Ihlaa-us-Sunnan, Maulana Zafar Ahmed Usmani, (Arabic), P144, Vol 2 (hereinafter referred to as ``Sunnan").

6. So that the waiting period of Iddat is not unduly prolonged for fear of pregnancy, as the waiting period of pregnant women

extends until delivery. See Tafseer Marriful Qur'an, Vol 1, p552.

7. As opposed to ordinary contracts for which no specific procedure is laid down. They may be cancelled verbally, in writing or by conduct indicative of repudiation.

8. In other words, no further divorce must be given prior to the expiry of the Iddat, so as to cause the least harm to the wife (Sunnan, p144) and leave open the option of reconciliation.

9. Sunnan, p143.

10. By abandoning the procedure prescribed.

11. Imams Malik, Shafei, and hanbal were of the view that the Sunnah procedure is the giving of divorce in a period of purity in which cohabitation has not occurred and thereafter, the wife be left to complete her prescribed waiting period as stated under the title: "The correct manner of giving divorce." For instance, Imam Hanbal says:

"Sunnah divorce is one. Then the wife is left to complete three menstrual periods."

However, the Hanafi jurists divided Sunnah divorce into two:

i) Ahsan, or the best procedure which coincides with the Sunnah divorce of Imam Malik, Shafei and Hanbal – ie., pronouncing one divorce in a period of purity as stated above.

ii) Hasan, which refers to the procedure of giving one divorce in three separate stags of purity, and has been used in apposition to Bidah (ie., the prohibited manner of giving three divorces simultaneously, or in one period of purity, or the giving of divorce during menstruation or in a period of purity wherein sexual relations occurred).

See Sunnan, p144.

12. Maulana Taqi Usmani, op cit, quoted at p164.

13. The divoce precedent to the exercise of the right of re-taking would be included in the computation.

14. Or, the husband dies.

15. The Prophet (Sallal lahu alaihi wa sallam) cursed the parties who entered into a scheme with the express purpose of remarriage to the first husband in the following words:

    ``The Prophet of Allah cursed the (second husband) who makes the divorced wife lawful and the person (first husband) for whom such woman is made lawful." (Sunnan p126).

16. The Shafei view is that the waiting period is three period of purity on the basis that the word ``Quru" in the verse cited refers to ``purity" and ``menstrual period". The Hanafi jurists have chosen the latter meaning on the basis of its use in the Hadith. See Sunnan p253.

17. In accordance with the Hadith relating to Ibn Umar (R.A.) in this regard, see Tafseer Mazhari. This applies to a consummated wife.

18. See generally Maulana Muhammad Taqi Usmani op cit, p193-202.

19. Known as Kinayah
20. See Durrul Mukhtar on this section.
21. Known as Sareeh
22. Technically called Rujat.
23. See Tafsir Marriful Qur'an op cit.
24. See generally Durrul Mukhtaar and Al Heelatul Naajizah – Maulana Thanvi.
25. See generally Hedayah and Durrul Mukhtar.
26. Because the speaker is in control of his speech although he does not agree with the effect thereof. Imam Shafei and Malik dissent in this regard. Coercion may be used to extract a divorce from an oppressive husband who refuses to grant it out of spite.
27. Because the intoxication was caused by a culpable act.
28. See reason set forth in note 26.